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Robert A. Stewart

John Richard Steincipher
University of Washington School of Law

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PROBATE REFORM IN WASHINGTON

ROBERT A. STEWART* AND JOHN RICHARD STEINCIPHER**

In 1960, two events occurred which illustrate current disenchantment with Washington probate law and highlight the need for reformation and modernization. In that year the voters of this state overwhelmingly¹ adopted an Initiative providing for joint tenancy, despite counsel from the bar that "the initiative is dangerous and that if adopted . . . will bring back a state of chaos and disrupt the operation of our modern and progressive community property laws."² The concern from which this legislation issued was indicated in the Initiative's opening clause, "[J]oint tenancy with right of survivorship permits property to pass to the survivor without the cost or delay of probate proceedings. . . ."

The Board of Governors of the Washington State Bar Association, responding to its obligation to eliminate the confusion, doubt, and mistrust in matters of probate, referred to the Committee on Real Property, Probate and Trusts the major task of reviewing the entire probate code³ and of recommending necessary and desirable revisions. After four years, the work of the Committee is expressed in a Revised Draft of RCW Title 11, which has been approved by the Board of Governors for submission to the 1965 legislature. In preparing this draft the Committee sought to preserve the framework and structure of the present

* Member, Washington State Bar Association.

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¹ The vote was: For—647,529; Against—430,698. WASH. SECRETARY OF STATE OFFICIAL ABSTRACT OF VOTES, STATE GENERAL ELECTION 7 (1960).

² Report of the President to the Washington State Bar Association, 35 WASH. L. REV. 492, 495 (1960).

³ RCW Title 11 includes matters of guardianship and trusts as well as probate. Since 1961 the chairman of the Probate Committee has been Mr. George T. Shields of the Spokane Bar. Preliminary work upon the current revision was undertaken by the late Professor J. Gordon Gose, and the preliminary draft of the new code was prepared by the State Code Revisor, Richard O. White, and his assistant, E. Lee Collins. Preparation of the revised draft, now being put in bill form, was done by John Richard Steincipher, co-author of this article, acting as Staff Assistant to the Committee.

Probate Code. In this respect the Model Probate Code constituted a valuable research and reference source.⁴

The objectives sought by the Committee in drafting the recommended alterations coincide with the lay and professional criticism of the current code. The draft represents an attempt to reduce the cost of administering decedents' and incompetents' estates and the time required for such administration, as well as the liberalization of the administration of small estates and the alleviation of surprise results in cases of intestacy. Underlying this was the desire to simplify procedures and eliminate unnecessary steps and requirements, along with archaic provisions of the current code, and to clarify areas of doubt and confusion.

What has resulted is a major overhaul of the Washington Probate Code which deserves careful scrutiny and considered analysis. The following is a discussion of the most important alterations and innovations, in terms of the changes recommended by the Committee and the need for and effect of such change.

DESCENT AND DISTRIBUTION

The Probate Committee has recommended a provision⁵ based on the Model Probate Code which effects significant changes in the law of

⁴ The Model Probate Code was promulgated in 1946 by the Section of Real Property, Probate and Trust Law of the American Bar Association in cooperation with the University of Michigan Law School; it is now out of print and in the process of revision.

⁵ Provisions which are new to the Probate Code have been denominated "New Section," in the Revised Draft of RCW title 11. We are here concerned with New Section 11.04.015, which provides that, "The net estate of a person dying intestate shall descend subject to the provisions of RCW 11.04.250 and be distributed as follows: (1) Share of surviving spouse. The surviving spouse shall receive the following share: (a) All of the net community estate; and (b) One-half of the net separate estate if the intestate is survived by issue; or (c) Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his parents, or by one or more of the issue of one or more of his parents; or (d) All of the net separate estate, if there is no surviving issue nor parent nor issue of parent. (2) Shares of others than surviving spouse. The share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, shall descend and be distributed as follows: (a) To the issue of the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or if of unequal degree, then those of more remote degrees shall take by representation. (b) If the intestate not be survived by issue, then to the parent or parents who survive the intestate. (c) If the intestate not be survived by issue nor by either parent, then to those issue of the parent or parents who survive the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or, if of unequal degree, then those of more remote degree shall take by representation. (d) If the intestate not be survived by issue nor by either parent, nor by any issue of the parent or parents who survive the intestate, then to the grandparent or grandparents who survive the intestate, the maternal grandparent or grandparents sharing equally with the paternal grandparent or grandparents."

intestate succession.⁶ While the distinctive characteristic of this provision is the elimination of a separate method for distributing real and personal property, more importantly, a very substantial share of the estate is given to the surviving spouse. For example, (1)(a) of this new section (11.04.015) stipulates that, on the death of one spouse, his share of the community estate passes to the surviving spouse rather than to his issue as in the present code.⁷ In the majority of small estates where there is a will, this is the means of disposition which the testator desires. Yet the current code fails to recognize this and works a "surprise" when, upon death intestate, half of the community property falls to the issue. This creates a particularly aggravated problem where such children are minors and where a guardianship is required. True, there may be instances when the current distribution is preferred; for example, where the folly, personality or prejudices of the surviving spouse deprive the issue of ever sharing in the community estate. However, it is this possibility which most often initiates resort to counsel and the making of a will, not the assumption that the surviving spouse will fall heir to all of the community property. Thus, the suggested provision eliminates the "surprise" and achieves, even on intestacy, the same results as a "joint tenancy" or community property agreement without the serious legal complications or deficiencies which are peculiar to these non-testamentary devices.⁸

In addition to receiving all of the "net community estate,"⁹ the surviving spouse will now take one-half of the net separate estate if the intestate is survived by issue, or three quarters of such estate if there be no surviving issue but the intestate is survived by one or more of his parents or by one or more of the issue of one or more of his parents.¹⁰ The share of the net separate estate not distributable to the surviving

⁶ This section provides for the descent and distribution of the "net estate" (defined as the real and personal property of a decedent exclusive of homestead rights, exempt property, the family allowance, and enforceable claims against, and debts of, the estate) of a person dying intestate, and replaces RCW 11.04.020, relating to the descent of separate real property, RCW 11.04.030, relating to the descent of separate personal property, and RCW 11.04.050, relating to descent of community property.

⁷ RCW 11.04.050.

⁸ It can be argued that this proposal would work a hardship in a case where one spouse dies a few days before a divorce is granted and the surviving spouse takes all of the community property to the exclusion of the minor children of a prior marriage. Again, such a case only points up the desirability of a will when things such as divorce are contemplated.

⁹ "Net community estate" refers to community property defined in RCW 26.16.030, subject to community debts and the decedent's separate debts to the extent of his one half interest therein.

¹⁰ The reference to "one or more" parents allows for both natural and adoptive parents, and for both father and mother.

spouse or the entire net estate if there be no surviving spouse descends first to the issue of the intestate, or, if the intestate is not survived by issue, then to the parent or parents who survive the intestate.¹¹ If the intestate is not survived by issue or by either parent, then such share, or the entire net estate, goes to those issue of the parent or parents who survive the intestate. For want of any of these persons, and as a last category of takers short of having the property escheat to the state, the grandparent or grandparents who survive the intestate are nominated. Although the latter situation is not provided for in the existing statute, such a provision is believed to coincide with the intestate's natural ties of affection and to be within accepted ideas of responsibility for support. The inclusion of grandparents as "heirs" is of particular advantage where the intestate is a minor child whose only relatives are his grandparents.

Descent, either to issue of the intestate, or to issue of the parent or parents who survive the intestate, is, by the suggested definition of degree of kinship,¹² *per stirpes*¹³ only if the claimants are in unequal degrees. In such a case the stirpes are those represented by the claimants in the nearest degree to the intestate. The exclusion of some blood ancestors brought about by the descent and distribution provisions (chapter 11.04), along with the definitions of representation¹⁴ and degree of kinship in chapter 11.02, is not new to the Probate Code and is believed to accord with the wishes of the average decedent who dies intestate. The assumption underlying this exclusion is that some rela-

¹¹ When there is a surviving spouse, but no surviving issue, such parents would take the remaining one-fourth of the net separate estate.

¹² *Degree of kinship* has been defined as "the degree of kinship as computed according to the rules of the civil law; that is, by counting upward from the intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of these two counts." New Section 11.02.005(5).

¹³ *Per stirpes* "denotes that method of dividing an intestate estate where a class or group of distributees take the share which their deceased would have been entitled to, taking thus by their right of representing such ancestor, and not as so many individuals." BLACK, LAW DICTIONARY 1294 (4th ed. 1951).

¹⁴ *Representation* is defined as "a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate, and is accomplished as follows: After first determining who, of those entitled to share in the estate, are in the nearest degree of kinship, the estate is divided into equal shares, the number of shares being the sum of the number of persons who survive the intestate who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the intestate, but who left issue surviving the intestate; each share of a deceased person in the nearest degree shall be divided among those of his issue who survive the intestate and have no ancestor then living who is in the line of relationship between them and the intestate, those more remote in degree taking together the share which their ancestor would have taken had he survived the intestate. Posthumous children are considered as living at the death of their parent." New Section 11.02.005(3).

tives might be so distant that the decedent might well prefer that his property go to the state rather than to such relatives.¹⁵

Inheritance by Adopted Children. Having defined those ascendants, descendants and collaterals who are entitled to a share of the intestate's estate, the proposed code denotes such persons, including the surviving spouse, as "heirs."¹⁶ However, one important development is the qualification that "A lawfully adopted child shall not be considered an heir of his natural parents for purposes of this title."¹⁷ This provision nullifies the inclusion of "all lawfully adopted children" in the proposed definition of "issue,"¹⁸ for purposes of intestate succession. However, it does not affect the stipulation of RCW 26.32.140 that an adopted child is the legal heir and lawful issue of his adoptive parents, entitled to the right of inheritance and the right to take under testamentary disposition. Thus, though the adopted child may inherit from his adopters (a right which, when once acquired, cannot be lost by his adoptive parent's intent to disinherit him unless expressed in a properly executed will)¹⁹ the right of inheritance from his natural parents is lost.²⁰ Although this proposed amendment will seriously hamper adoption (between adults, one of the other) as a device to reduce inheritance tax liability, it recognizes the expectations of the natural mother of an illegitimate placed for adoption.

Inheritance by Illegitimates. The inheritance rights of an illegitimate child, who has not been adopted, have been significantly extended by the Probate Committee.²¹ In line with the repudiation in nearly

¹⁵ MODEL PROBATE CODE § 22, comment. (Simes 1946).

¹⁶ New Section 11.02.005(6).

¹⁷ New Section 11.04.085.

¹⁸ *Issue* "includes all the lawful lineal descendants of the ancestor, all lawfully adopted children, and illegitimates as specified in [New Section] RCW 11.04.081." New Section 11.02.005(4).

¹⁹ *West v. Stanfield*, 48 Wn.2d 55, 290 P.2d 704 (1955).

²⁰ The case of *In re Roderick's Estate*, 158 Wash. 377, 291 Pac. 325 (1930), declared that an adopted child is, in a legal sense, a child of both his natural and his adoptive parents, and, in the absence of statutes to the contrary, is entitled to inherit from both. The Committee recommends such a statute to the contrary.

²¹ New Section 11.04.081 replaces RCW 11.04.080 and 11.04.090 and provides: "For purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, the distribution of exempt property and the making of family allowances. When the parents of an illegitimate child shall marry subsequent to his birth, or the father shall acknowledge said child in writing, such child shall be deemed to have been made the legitimate child of both of the parents for purposes of intestate succession."

every state of the notion that an illegitimate child is "nullius filius" and incapable of inheriting and transmitting any estate, an illegitimate child and his issue may, under the proposed Code, inherit from his mother and from his maternal kindred in all degrees, and they may inherit from him. This proposal departs from the current treatment of illegitimates in that, heretofore,²² an illegitimate child could not claim as representing his mother any part of the estate of her kindred unless his parents had intermarried and his father had, in writing signed in the presence of a competent witness, acknowledged him as his child.²³ Further, departing from existing provisions, the Probate Committee has expressly recognized an illegitimate child's rights with respect to a homestead, the distribution of exempt property, and the award of family allowances, to the extent that they may be claimed by virtue of legitimacy with respect to his natural mother.

Elimination of the Doctrine of Ancestral Property. Under the express provisions of the existing code,²⁴ property which came to an intestate by descent, devise, or gift from one of his ancestors,²⁵ could not be inherited by those who were not of the blood of such ancestor.²⁶ With the adoption of the descent and distribution provisions recommended by the Committee,²⁷ declaring *inter alia* that kindred of the half blood inherit the same share which they would have inherited if they had been of the whole blood,²⁸ the "anachronistic doctrine" of ancestral property will have been repudiated. Although one may visualize instances where preservation of the blood-line integrity of property is

²² RCW 11.04.080.

²³ Under the suggested provision, the father need only acknowledge such child in writing; no witnesses are required.

²⁴ RCW 11.04.100.

²⁵ This includes kindred of such ancestor's blood.

²⁶ As interpreted by the court in *In re Kurtzman's Estate*, 65 Wash. Dec. 2d 242, 396 P.2d 786 (1964), the phrase in RCW 11.04.100 that "unless the inheritance comes to the intestate by descent, devise, or gift from one of his ancestors, or kindred of such ancestor's blood, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance," only limits the right to inherit by those of the half blood, and does not establish a preference in favor of kindred of ancestors devolving property upon decedents. The Committee's proposal will eliminate both the common law "half-blood" and "ancestral property" restrictions, as well as the mixture of these announced in *In re Kurtzman's Estate*.

²⁷ New Sections 11.04.015 and 11.04.035.

²⁸ New Section 11.04.035 provides that "Kindred of the half blood shall inherit the same share which they would have inherited if they had been of the whole blood." The term "whole blood" means the relationship of children who have both parents in common, and "half-blood" designates the relationship between children who have at least one of their parents in common. This section, by putting both whole and half bloods on a par, repudiates the common law rule that property may not pass to those related by the half blood.

desirable (as where it might fall out of the family to a non-related surviving spouse), such considerations are believed to be outweighed by the resultant complications to the descent of property. Also of moment here is the desire to effectuate the assumed wish of the intestate—as opposed to that of collateral relatives.

Abolition of Tenancy by the Entireties. Title 11 currently contains a memorial section²⁹ entitled “Survivorship Between Joint Tenants Abolished—Exceptions.” In 1961, with the passage of what is now RCW chapter 64.28, establishing joint tenancies with right of survivorship, this section was repealed and such repealer is presumed to have resurrected the property device of tenancy by the entireties as it existed at common law. Historically, tenancy by the entireties was allowed only between a husband and wife and was created by a conveyance to them, whereupon each became seized and possessed of the entire estate with right of survivorship. The characteristic which distinguished this property device from joint tenancy was the fact that it could be terminated only by joint action of the husband and wife during their lives. As Professor Atkinson notes,³⁰ the arguments for the abolition of this device arise from the uncertainty as to what language will create the estate, the indestructibility of the estate without mutual consent in the event of matrimonial discord, and the fact that property so held is generally subject to the debts of the deceased tenant. Further, in Washington, RCW 83.04.020 excludes real property held by the entireties from the decedent’s gross estate for purposes of inheritance taxation; such exclusion is deemed neither justifiable nor desirous.

Considering these objections, and believing that this device has been superseded by our system of community property, the Probate Committee has recommended its express abolition.

To the extent that the resurrection of such tenancies has created vested rights, these are saved by the proposed “savings clause” which applies to all of title 11.³¹ This clause is recommended in part because of the difficulty of anticipating “accrued or vested” rights protected by

²⁹ RCW 11.04.070.

³⁰ ATKINSON, *WILLS* 165 (2d ed. 1953).

³¹ The proposed “savings clause” was adopted from section 2(b) of the Model Probate Code and provides that, “No act done in any proceeding commenced before this title takes effect and no accrued right shall be impaired by its provision. When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute in force before this title takes effect, such provisions shall remain in force and be deemed a part of this code with respect to such right.”

due process of law,³² and also because the Probate Committee entertained no intent of depriving persons of their lawfully acquired rights.³³

Elimination of a Separate Method for the Descent of Real and Separate Property—Liability for Debts. The distinctive characteristic of the scheme proposed for descent and distribution³⁴ is the elimination of a separate method for distributing real and personal property. While this suggestion does not alter the existing order of liability of property for the debts of the estate, the Committee has expressly abrogated the interpretation that RCW 11.56.020 requires personal assets to be first applied to the payment of the decedent's debts, and that only when such personalty was exhausted could realty be employed.³⁵ A new section³⁶ has been recommended which stipulates that there is to be no priority between real and personal property in determining what property of the estate should be sold, leased, or mortgaged under RCW 11.56. Thus the order of liability has been placed in the court's discretion, subject to the dictates of RCW 26.16—establishing the community property system in Washington, and basing the order of liability upon the nature of the debt as opposed to the real or personal character of the property. Therefore, as announced in *In re Schoenfeld's Estate*,³⁷ all of the community property is subject to administration for the purpose of collecting assets and paying community debts, although the community property is liable only for community obligations and separate debts to the extent of the decedent's one-half interest therein. No change is made by the Committee's recommendation that all of the net community estate descends to the surviving spouse.³⁸ The community property is primarily liable for community debts, while separate property is primarily liable for separate debts, and a creditor must exhaust his remedy against the appropriate

³² In *Hamilton v. Hersch*, 2 Wash. Terr. 22, 5 Pac. 215 (1884), the court held that dower and curtesy were not vested property rights, but were only inchoate rights which could be abolished (RCW 11.04.060) without a violation of due process.

³³ The proposed "savings clause" is also applicable where limitations periods have been altered, i.e., RCW 11.40.010, where the time for filing creditors' claims has been reduced from six to four months, and the extension of the six year limitation period imposed by RCW 11.04.270 to all of the property of the estate, as opposed to only realty.

³⁴ New Section 11.04.015. See note 6 *supra*.

³⁵ See *In re Binge's Estate*, 5 Wn.2d 446, 105 P.2d 689 (1940).

³⁶ New Section 11.56.015 provides that "In determining what property of the estate shall be sold, mortgaged or leased for any purpose provided by RCW 11.56.020 and 11.56.030 [as amended], there shall be no priority as between real and personal property, except as provided by will, if any."

³⁷ 56 Wn.2d 197, 351 P.2d 935 (1960).

³⁸ New Section 11.04.015(1)(a).

primary fund before he can resort to the secondary fund. The decedent could, of course, provide by will that all of the debts of the estate, including community obligations, are to be paid out of his share of the community property and such a direction will be honored so long as his estate is adequate to pay those debts.

WILLS

The right to dispose of one's property by will, which the Washington court has declared a valuable property right assured by law,³⁹ is presently codified in RCW 11.12.010 and has not been altered in the Probate Committee's revision. However, the definition of "will"⁴⁰ as including all codicils "attached to any will," has been deleted, and "will" is now defined as including all codicils.⁴¹ A codicil is expressly said to mean "an instrument executed in the manner provided . . . for wills, which refers to an existing will for the purpose of altering or changing the same, and which need not be attached thereto." The inclusion of this definition was prompted by the court's interpretation of the phrase "attached to any will" as requiring actual physical attachment.⁴² The proposed definition of codicil conforms to that set forth in *In re Whittier's Estate*⁴³ (a codicil traditionally being held to the formalities of a will in its execution), and is designed to eliminate the necessity of actual physical attachment. What is now required is internal reference to an existing will. Although a codicil lacking the necessary internal reference would not be admitted to probate, the "surprise" resulting from want of successful annexation has been eliminated. Further, the process of construing the will and its codicils together for the purpose of gathering the general intention pervading both⁴⁴ has been facilitated.

Nun-Cupative Wills. The formalities by which one exercises the right to make a will are presently set forth in RCW 11.12.020, and no substantive change has been recommended. However, the provision relating to nuncupative wills has been repositioned⁴⁵ for purposes of clarity, and the amount of wages or personal property which may be so bequeathed has been increased from two hundred to one thousand dol-

³⁹ *In re Schafer's Estate*, 8 Wn.2d 517, 113 P.2d 41 (1941).

⁴⁰ RCW 11.12.240.

⁴¹ New Section 11.02.005(8) and (9).

⁴² See *In re Whittier's Estate*, 26 Wn.2d 833, 176 P.2d 281 (1947), and *State ex rel. Schrimmer v. Superior Court*, 143 Wash. 578, 255 Pac. 960 (1927).

⁴³ 26 Wn.2d 833, 176 P.2d 281 (1947).

⁴⁴ *Hunt v. Hunt*, 18 Wash. 14, 50 Pac. 578 (1897).

⁴⁵ New Section 11.12.025.

lars. This but reflects an attempt to make the allowance of specific dollar amounts more realistic throughout title 11,⁴⁶ and does not evidence dissatisfaction with the court's pronouncement that nuncupative wills are disfavored in law because of the opportunities for fraud and perjury attending the probate of such wills.⁴⁷

Revocation of Will by Subsequent Marriage. Under the current code,⁴⁸ unless provision is made for the surviving spouse by marriage settlement or unless such surviving spouse is provided for in the last will or mentioned therein such as to indicate an intention not to provide for such spouse, a will executed prior to marriage is deemed revoked. Although no disagreement is taken with the policy manifested by this provision, it seems extreme to require complete frustration of the testator's intent where this is not necessary. To rectify this, the Committee suggests that the will be revoked only as to the surviving spouse.⁴⁹ Through this change the spouse will take the complete share which would have been taken upon death intestate, yet the testator's intention will be observed with respect to the remainder of his estate.

Proof of Wills. Although experience indicates that our current procedure for initiating the probate of an estate is generally quite efficient and simple, a problem does arise in obtaining the testimony needed to prove a will. It is currently required⁵⁰ that witnesses appear and testify in person unless prevented by sickness from attending, or unless they reside out of state, or more than thirty miles from the place where the will is to be proven. If a witness is ill or resides more than thirty miles away, then a commission must be issued to a judge, justice of the peace, or notary public (the latter being most often used) directing him to take and certify the testimony of the witness and to then return the commission and deposition directly to the court. While this procedure is elaborate, it relies, in the final analysis, entirely upon the

⁴⁶ See also RCW 11.76.090 where the committee recommends an increase in the amount distributable to a minor, without the necessity of a bond or the appointment of a guardian, from one hundred to five hundred dollars.

⁴⁷ *Brown v. State*, 87 Wash. 44, 151 Pac. 81 (1915).

⁴⁸ RCW 11.12.050.

⁴⁹ RCW 11.12.050 would thus be amended to read: "If, after making any will, the testator shall marry and the spouse shall be living at the time of the death of the testator, such will shall be deemed revoked as to such spouse, unless provision shall have been made for such survivor by marriage settlement, or unless such survivor be provided for in the will or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received. A divorce, subsequent to the making of a will, shall revoke the will as to the divorced spouse."

⁵⁰ RCW 11.20.030.

integrity of the notary and is no more immune from the possibilities of fraud than the practice of using a simple affidavit with a photographic copy of the will attached—the method now used in California.⁵¹ The use of such an affidavit alleviates the severe hardship which the oral testimony requirement works upon the witness of advanced years and the witness who is unable to leave his business or place of employment. No recommendation is made with regard to this device in the current proposal.

The Committee has recommended the deletion of the existing provision concerning the proof required where one or more witnesses are unable or incompetent to testify.⁵² In its place, a much simplified clause is proposed which retains the intent of the former section. It is now specified⁵³ that the subsequent incompetency for whatever cause, of one or more of the subscribing witnesses, or, the inability to testify in open court or pursuant to commission, shall not prevent the probate of a will. By this the Committee has not meant to authorize a “self-proving” will, but has provided that the competency of such witness must be proven, and the handwriting of the testator and at least one absent subscribing witness must be established. Further, by authorizing the court to consider such other facts and circumstances as would tend to prove the will, a wider discretion is permitted the court than under the present code, and the necessity of obtaining a special court order is dispensed with.

PROBATE NOTICES

No comprehensive effort to modernize the Probate Code could be accomplished without consideration of its impractical, archaic notice provisions. Not only is such a review called for by the desire to eliminate the layman's “make-work” criticism but also by the ramifications of procedural due process noted by the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*⁵⁴ *Mullane* indicates that publica-

⁵¹ CAL. PROBATE CODE § 329 provides that in the absence of a contest the court may admit the will to probate on the evidence of one subscribing witness only, either by testimony in court, deposition or affidavit, in which latter case a photographic copy of the will must be attached.

⁵² RCW 11.20.040.

⁵³ See the proposed amendatory clause to RCW 11.20.040.

⁵⁴ 339 U.S. 306 (1950). Until this decision, it was generally held that decrees of distribution based on posted or published notice were valid. *Mullane* in substance held that published notice under a New York statute concerning administration of trust estates might not be adequate if the person giving the notice knew the whereabouts of the interested parties and failed to give them direct notice of some sort. This decision prompted the Washington Supreme Court to adopt RPPP 98.04W requiring, *inter alia*, the mailing of notice of appointment and pendency of probate

tion at best is a dubious method of giving notice. Our present system seems wholly inadequate in this respect insofar as it sanctions the publication in many newspapers scattered throughout a given county of lengthy, obscure notices which are difficult to read and understand.

Official Probate Newspaper. To rectify the existing situation, a new chapter was recommended by the Committee,⁵⁵ calling for the annual award by the county commissioners of a single contract to a "legal" newspaper to function as the official probate newspaper in that particular county. All notices in connection with the administration of a decedent's estate were to be published by line item in that paper. The obvious advantage, in terms of "due process" and the requirement that notice be given which is reasonably calculated to reach those affected, is at once apparent. Under such a system, any creditor, heir or beneficiary could, with certainty, look to one particular publication for information concerning all decedent's estates without the necessity for searching through half a dozen or more publications. Further, the creation of this notice device would eliminate innumerable duplications of language and reduce printing space, while saving the publication expenses now incurred. It must be emphasized that the foremost consideration in this proposal is simply that due process is not satisfied by the current, authorized burial of such notices, and that to sustain the ignorance of interested parties in an attempt, perhaps, to aid marginal publications is without justification. Unfortunately, the sponsors⁵⁶ expressed a different opinion, and this proposal is not included in the bill to be presented the legislature. Thus, due to political expediency, revision of notice provisions is confined to establishing consistency in language, *i.e.*, "a legal newspaper" has been substituted for "some newspaper."

INVENTORY OF ASSETS—APPRAISEMENT

The purpose of the inventory, along with its appraisal, is to make a record of the property belonging to the estate, to indicate its presumptive value, and to furnish a basis upon which the personal representative makes his accounts and for which he is chargeable.⁵⁷ To

within twenty days after the appointment of a personal representative. Later, this rule was codified in RCW 11.76.040.

⁵⁵ RCW 11.18.

⁵⁶ By one vote, the proposal regarding the "official probate newspaper" failed to pass the Legislative Committee of the Washington State Bar Association; the Board of Governors accepted the Legislative Committee's judgment.

⁵⁷ MODEL PROBATE CODE § 120, comment (Simes 1946).

better effectuate this purpose, the Probate Committee has recommended several alterations. Under the plan proposed by the Committee, the personal representative is to make and return upon oath,⁵⁸ within three months of his appointment,⁵⁹ a true inventory of the property which has come in to his possession *or knowledge*.⁶⁰ This departs from existing RCW 11.44.010 insofar as that section required the filing of the inventory within one month from appointment. Further, provision is now made⁶¹ for the extension of the filing time where that is exigent due to the nature of the estate.

In facilitating the use of the inventory as indicative of the nature and extent of the property, all encumbrances, liens, or other secured charges against any particular item must now be listed. While a few states have provided for the listing of claims against the estate in the inventory, the Committee has provided only for the listing of the charges noted. Although a more inclusive enumeration would seem to better index the net worth of the estate, ordinarily this amounts to no more than conjecture on the part of the personal representative.

In the proposed scheme, a classification of property is specified, arranged in a sequence similar to that of the schedules used in a federal estate tax return.⁶²

An additional suggestion worthy of consideration has been made, although not recommended by the Probate Committee. That is the inclusion in the inventory of a statement of community assets. Such a specification would greatly aid in creating a valuable notice-giving document. Indeed, the authors of the Model Probate Code suggest that property held jointly or by the entirety be separately stated due to the tendency of some jurisdictions to subject such property to inheritance taxes.⁶³

In view of the special nature of partnership property and of its primary liability for the payment of partnership debts, no inventory of such property is required of the personal representative. (This inven-

⁵⁸ New Section 11.44.015 provides for the return of the inventory "upon oath," and continues this portion of existing RCW 11.44.010.

⁵⁹ New Section 11.44.015.

⁶⁰ While the Probate Committee has retained RCW 11.44.010's direction that the inventory include all property which has come into the personal representative's possession, it added the inclusion of such property as has come to his knowledge. New Section 11.44.015.

⁶¹ Existing RCW 11.44.010 made no provision for extending the time of filing the inventory; the Probate Committee recognizes that this may be required in particularly troublesome estates, and specific authorization is given in New Section 11.44.015.

⁶² Specifically, Form 706.

⁶³ MODEL PROBATE CODE § 120, comment (Simes 1946).

tory is to be filed within thirty days of the partner's death by the surviving partners.⁶⁴) However, the Committee has recommended⁶⁵ that the personal representative's inventory identify the decedent's proportionate share in any partnership.⁶⁶

Appraisal. Although the changes noted promise substantial benefit, the most significant reform has come with respect to procedures for appraisal. Corresponding to the classification of assets now proposed, a new section⁶⁷ is recommended which directs the appraisers to determine and state in figures opposite each item contained in the inventory, the fair net value thereof after deducting the encumbrances, liens, and other secured charges. The inventory and appraisal are then consolidated into one document which is to be filed within thirty days following the date of the appraisers appointment, unless extended by the court.

The Committee has recommended the deletion of the current section⁶⁸ providing that the personal representative is to make application to the court for the appointment of three disinterested persons as appraisers within thirty days after the filing of the inventory of the property of the estate. The proposed replacement merely specifies that application is to be made by the personal representative for the appointment of three suitable disinterested persons to appraise the property inventoried.⁶⁹ No time is set for making this application; however, a "reasonable time" is established by implication since the inventory is to be filed within three months from the date of the personal representative's appointment.⁷⁰ Although an existing code section⁷¹ refers to the compensation of the appraiser nominated by the Supervisor of the State Tax Commission, there is no specific recognition in RCW title 11 of the supervisor's right⁷² to so nominate one appraiser. The

⁶⁴ RCW 11.64.002.

⁶⁵ New Section 11.44.015(6) provides that the inventory is also to include "All other personal property accurately identified, including the decedent's proportionate share in any partnership, but no inventory of the partnership property shall be required of the personal representative."

⁶⁶ The Committee has also recommended retention of RCW 11.64.040, which authorizes the personal representative to agree with the surviving partner for continuation of the partnership business. Such agreement is subject to court approval.

⁶⁷ New Section 11.44.065 replaces existing RCW 11.44.020.

⁶⁸ RCW 11.44.010.

⁶⁹ New Section 11.44.055. The last paragraph of this recommended section provides, "If any part of the estate shall be in a county other than that in which the letters are issued, appraisers residing in that county may be appointed, or the same appraisers may act." The clause was taken from existing RCW 11.44.010.

⁷⁰ New Section 11.44.015.

⁷¹ RCW 11.44.010.

⁷² RCW 83.16.040.

Committee recommends the express recognition of this right in the probate code, as well as providing for its waiver.⁷³ By custom the second appraiser is nominated by the personal representative and the third is nominated by the court.⁷⁴ Although the Committee has suggested no method to curtail the use of the power of nomination for political purposes by both governors and judges—a fact of life, sometimes resulting in the appointment of persons having no particular competency⁷⁵—it is suggested that the fees of the three appraisers hereafter be computed on the basis of assets actually appraised. Thus a new section—⁷⁶ provides that the valuation of moneys, drafts, bank and saving and loan association accounts, checks and bonds, or securities listed with a recognized securities market or exchange is not to be included in computing any appraiser's fee. This limitation is meant to apply to the set percentage specified for the supervisor's nominee,⁷⁷ as well as to any percentage which the court might employ in determining the "reasonable" compensation to be allowed the other appraisers.

Only the nominee of the Inheritance Tax Supervisor must be paid a fee of one-tenth of one percent of the appraised value⁷⁸ of the assets. But, despite the prohibition announced in *In re Crutcher's Estate*⁷⁹ against the substitution of this measure for the discretion of the court with respect to compensation of the other appraisers, in practice, all three are paid this amount. Nevertheless, with the exclusion of those items requiring no appreciable effort in determining value, unnecessary expenses have been curtailed and the value of such patronage diminished. Also to these ends is the suggestion that the rule under which appraisement may be dispensed with be liberalized. As proposed by by the Committee,⁸⁰ where the inventory or other proof, demonstrates

⁷³ New Section 11.44.055 provides in part, "The personal representatives shall apply to the court for the appointment of three suitable disinterested persons to appraise the property inventoried, one of whom shall be the nominee of the supervisor of the inheritance tax division of the tax commission of the state of Washington, unless said supervisor waives his right to nominate an appraiser, and the court shall appoint such appraisers."

⁷⁴ The practice of appointing the nominee of the personal representative as the second appraiser is not required by existing statute.

⁷⁵ A much better system prevails in California (CAL. PROBATE CODE § 605) where the court appoints only one appraiser from a list of qualified inheritance tax appraisers, and the single fee paid to him is less than the fee paid to each one in Washington. CAL. PROBATE CODE § 609 provides that the appraiser's fee shall be one-tenth of one percent of the first \$500,000 and one-twentieth of one percent above that amount.

⁷⁶ New Section 11.44.070.

⁷⁷ *Ibid.*

⁷⁸ RCW 11.44.010.

⁷⁹ 31 Wn.2d 16, 194 P.2d 964 (1948).

⁸⁰ New Section 11.44.080.

that the whole estate consists of personal property of less value than one thousand dollars⁸¹ the court may accept the verified appraisal of the personal representative in lieu of an appraisal by appraisers.

In assessing the alterations proposed with respect to appraisal, it must be remembered that any reform assaults an entrenched political plum. Undoubtedly, in suggesting even this minimal revision (there are those who would abolish the existing system altogether) the Committee has taken on a formidable foe; an adversary who will plead its case in committee as opposed to the floor of either house. Yet, in discharging its responsibility to the public and the Bar, this was a risk of defeat which the Committee had to take. Hopefully, it will be appreciated.

ADMINISTRATION OF DECEDENT'S ESTATES

A number of changes have been recommended by the Probate Committee to provide flexibility in the administration of decedent's estates and to reflect both modern business practice and practical necessity. Among the foremost of these is the alteration suggested in the procedure governing the sale of real estate.⁸²

Sale by Negotiation. In addition to sale by public auction, the existing code authorizes the private sale of real estate. However, all too often the publication of notice calling for bids on the property⁸³ occurs only after an earnest money receipt and agreement has been signed.⁸⁴ If an upset bid⁸⁵ is then received, the effort of the real estate broker who obtained the initial purchaser may have been in vain. Since one effect of this procedure is to discourage efforts to find buyers, the result is the frustration of the purpose of the statutory procedure governing a sale by competitive bids. Both the artificiality of the existing provisions and the exigencies of prevalent practice have prompted the inclusion of specific authorization of sale by negotiation.⁸⁶ While some liberalization is thus effected, sale by negotiation will not

⁸¹ This amount is stated to be "exclusive of moneys, drafts, bank and savings and loan association accounts, checks, and bonds or securities listed with a recognized securities market or exchange..."

⁸² Authority to sell real estate is granted broadly in RCW 11.56.010, and particularly in RCW 11.56.030.

⁸³ RCW 11.56.080.

⁸⁴ The earnest money receipt and agreement should, of course, be conditioned on obtaining the approval of the sale by the superior court.

⁸⁵ RCW 11.56.110.

⁸⁶ This has been accomplished by inserting, in RCW 11.56.020 relating to personalty, and in RCW 11.56.050 relating to realty, specific authorization for "sale by negotiation."

jeopardize the interests of the heirs or the rights of creditors of the estate, since such sales are subject to order⁸⁷ and approval⁸⁸ of the court.

Closely allied with the specific sanction of sale by negotiation is the recommendation⁸⁹ authorizing the personal representative, without advance court approval, to pay the customary and reasonable auctioneer's and broker's fees and any necessary expenses for abstracting, title insurance, survey, revenue stamps, and other necessary costs and expenses incurred, out of the proceeds realized.

Power to Lease, Exchange and Borrow. In addition to the traditional sale and mortgage of property, the ability of the personal representative to meet cash requirements has been expanded by authorization of the lease⁹⁰ and exchange of property,⁹¹ both real and personal. The purpose of these provisions is to permit the effective management of assets through additional flexibility, while the rights of interested persons are safeguarded by subjecting the exercise of such authority to the direction and control of the court. In the same vein, the Committee has recommended a provision⁹² allowing the personal representative to borrow on the general credit of the estate. Insofar as this transcends the current restriction to mortgages, the personal representative's financial power has been significantly improved.

Performance of Decedent's Contracts. Pursuing the intent to modernize estate administration, the recommendation is also made that the Probate Code be expanded to allow the performance of all of the

⁸⁷ RCW 11.56.050.

⁸⁸ RCW 11.56.100.

⁸⁹ New Section 11.56.265.

⁹⁰ As amended, RCW 11.56.010 will read: "The court may order real or personal property sold, leased or mortgaged...but no sale, lease or mortgage of any property of an estate shall be made except under an order of the court, unless otherwise provided by law."

⁹¹ New Section 11.56.005 provides: "Whenever it shall appear upon the petition of the personal representative or of any person interested in the estate to be to the best interests of the estate to exchange any real or personal property of the estate for other property, the court may authorize the exchange upon such terms and conditions as it may prescribe, which include the payment or receipt of part cash by the personal representative. If personal property of the estate is to be exchanged, the procedure required by this chapter for the sale of such property shall apply so far as may be; if real property of the estate is to be exchanged, the procedure required by this chapter for the sale of such property shall apply so far as may be."

⁹² New Section 11.56.280 provides: "Whenever it shall appear to the satisfaction of the court that money is needed to pay debts of the estate, expenses of administration, inheritance tax, or estate tax, the court may by order authorize the personal representative to borrow such money, on the general credit of the estate, as appears to the court necessary for the purposes aforesaid...."

decedent's contracts, not just those to convey real property.⁹³ (A similar provision is recommended with respect to guardianship estates.⁹⁴) This necessary and prudent extension of authority is designed to increase the personal representative's effectiveness in the management and control of the estate, subject to court authorization and direction. Three provisions contribute to this scheme: The first authorizes the personal representative to perform contracts of his decedent;⁹⁵ the second allows the person to whom performance was to run to apply for a court order directing the personal representative to perform;⁹⁶ and the third authorizes the personal representative to bring all actions upon contract which could have been maintained by the decedent.⁹⁷ These sections further reflect the intent of, and supplement, existing authority to continue a decedent's going business⁹⁸ although the personal representative's power in this respect continues to be prescribed by the court's order of authorization.

Non-Intervention Wills. Chapter 11.68 embodies the non-intervention will provisions and establishes the statutory facility for administration without court supervision. By virtue of RCW 11.68.010, "After the probate of any such will and the filing of the inventory all such estates may be managed and settled without the intervention of the court, if the last will and testament so provides." In construing this provision, the court has emphasized that once the intention to dispense with administration is found from the express words or necessary implication of the will,⁹⁹ the executor becomes a "trustee," deriving his powers from the will and not from the court.¹⁰⁰ Despite the interpreta-

⁹³ RCW 11.60.010, as amended, will provide: "If any person, who is bound by contract, in writing, shall die before performing said contract, the superior court of the county in which the estate is being administered, may upon application of the personal representative, without notice, make an order authorizing and directing the personal representative to perform such contract."

⁹⁴ RCW 11.92.130.

⁹⁵ RCW 11.60.010.

⁹⁶ RCW 11.60.020, as amended, provides: "If the personal representative fails to make such application, then any person claiming to be entitled to such performance under such contract, may present a petition setting forth the facts upon which such claim is predicated. Notice of hearing shall be in accordance with the provisions of RCW 11.16.081."

⁹⁷ RCW 11.48.090, as amended, provides: "Actions for the recovery of any property or for the possession thereof, and all actions founded upon contracts, may be maintained by and against personal representatives in all cases in which the same might have been maintained by and against their respective testators or intestates."

⁹⁸ RCW 11.48.025 provides: "Upon a showing of advantage to the estate the court may authorize a personal representative to continue any business of the decedent, other than the business of a partnership of which the decedent was a member: provided, . . ."

⁹⁹ *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253 (1909).

¹⁰⁰ *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433 (1915).

tion of the right of non-intervention administration as a "vested right," the court has declared that one who submits the will for administration and his official acts to the control of the court, thereby waives non-intervention status.¹⁰¹ To prevent the extension of this waiver rule, the Probate Committee recommends the addition of a provision to the effect that "The obtaining of any interim order by the executor of a non-intervention will shall not be deemed to be a waiver of the non-intervention powers of such executor."¹⁰²

With one exception (see the discussion of "Probate Notice," above) the only other alteration made in this chapter is the extension to the non-intervention executor, of the power to borrow money on the general credit of the estate. Although this may be criticized insofar as the non-intervention executor acts without court supervision, and without notice to interested parties,¹⁰³ the need for modernization and flexibility is as important here as in supervised estates. Further, non-intervention status is achieved only by the express wish of the testator, who necessarily must have faith in the judgment and prudence of his nominee, and who may evaluate such plan in light of this grant of authority. While the court sits in a protective capacity in the administration of all estates, one must not minimize the testator's right to dispose of *his assets*, as *he* wishes.

Maintenance of Adequate Court Control. While on the one hand there is a need to simplify and modernize our probate procedure to the end that it will cost less in time and money, there must be sufficient court control to insure that the rights of all are protected. Experience has demonstrated that, although these may seem to be conflicting objectives, they can be simultaneously achieved. The Probate Committee of the King County Superior Court, under the chairmanship of Judge Eugene A. Wright, established in 1958 a program of control over estates for the purpose of insuring that personal representatives are properly and expeditiously performing their duties. Basically, it involves a systematic investigation of the condition of dormant estates and guardianships, *i.e.*, those which have not been closed and which apparently are not receiving the diligent attention required by applicable statute or court rule. This review is conducted by third year

¹⁰¹ *In re Clawson's Estate*, 3 Wn.2d 509, 101 P.2d 968 (1940).

¹⁰² RCW 11.68.010, as amended.

¹⁰³ It is, however, suggested that the special notice provisions of RCW 11.28.240 are applicable to non-intervention executors.

law students using a checklist prepared by the court. If defects or omissions are found, the file is placed on a probate review calendar and a notice is sent to the attorney of record. The results have been excellent. The program does not hinder those estates which are being handled properly or expeditiously, and at the same time it does improve the handling of all others. Serious defalcations have been discovered and protection of the rights of minor heirs, creditors and others has been considerably improved.¹⁰⁴

The King County Superior Court's program is clearly authorized by present law,¹⁰⁵ but because it is not mandatory, the superior courts in many counties do not have to exercise any supervision over estates and as a consequence unnecessary costs and delay can result.¹⁰⁶ Although the Probate Committee has made no specific recommendation with regard to this matter, consideration should be given to an amendment which would require the court in each county to conduct some type of continuous effective review of all probate files, and to take appropriate action to see that estates are properly and promptly administered.

In addition, the problem of neglect is compounded in non-intervention estates. Once a decree of solvency has been entered, the only opportunity the court has for ascertaining whether the administration is expeditious and proper is on the petition of a creditor or beneficiary.¹⁰⁷ The statute does not expressly authorize the court, on its own

¹⁰⁴ For a comprehensive report on the King County Superior Court's program, see Austin, *Court Supervision of the Administration of Estates and Guardianships*, 34 WASH. L. REV. 263 (1959). Prior to the establishment of this program it was not uncommon for estates in King County to remain open and dormant for years. See, e.g., Estate of Martin Burns, Probate No. 50457, Super. Ct. Wash., King County, where the file indicates that although the administrator was appointed in 1930, and qualified by filing his oath and bond, and although he later filed an inventory of stocks, real estate and other assets of apparent value, he never filed a final report and the estate has never been closed. The last action was taken in 1935 when the surety gave notice of its desire to be relieved of further liability. The file shows that the decedent died intestate, leaving as his heirs five brothers and sisters scattered from coast to coast. The matter has come to light recently as a result of efforts to locate present owners of certain stock listed in the inventory. In addition to the cost of re-opening the estate and tracing and reconstructing heirship, there are also clouds on the titles to the real property listed in the inventory which may now arise.

¹⁰⁵ RCW 11.28.250 provides, in part, that "Whenever the court has reason to believe that any executor or administrator has...wrongfully neglected the estate, or has neglected to perform any acts as such executor or administrator, or for any...reason which to the court appears necessary, it shall have power and authority, after citation and hearing to revoke such letters." See also RCW 11.28.160 and RCW 11.88.120. The latter section empowers the court to remove guardians for "good and sufficient reasons."

¹⁰⁶ The authors are familiar with an estate commenced in a county other than King, in 1955, which is still pending. The administrator of that estate has incurred costs and performed much of the work of an administrator without posting the bond as directed by the court.

¹⁰⁷ RCW 11.68.030 provides, in part: "If the person named in the will fails to

motion, to make inquiry because such power would presumably represent a violation of the principle of our non-intervention will statute.¹⁰⁸ Although again not dealt with in the Probate Committee's revision of Title 11, an amendment should be considered which would authorize the court to cite a non-intervention executor, after the estate has been pending for two years, to appear and show cause why the estate has not been closed.¹⁰⁹

ACCELERATION OF THE SETTLEMENT OF ESTATES—SMALL ESTATES

By virtue of existing RCW 11.40.010, creditors are permitted a period of six months within which to file their claims.¹¹⁰ Although this operates to the advantage of creditors in allowing substantial time to prepare their claims and the supporting affidavits (RCW 11.40.020), the emphasis is placed on delay as opposed to securing notice to creditors since the time period begins to run with the first publication of notice, and notice need be published but once each week for three successive weeks. An estate, regardless of size, ordinarily cannot be closed prior to the expiration of this six month period. The Probate Committee recommends the reduction of this time to four months.¹¹¹

The Probate Committee also recommends the alteration of RCW 11.04.270 which provides that a decedent's "real estate" is not liable for his debts where letters testamentary or of administration have not been granted within six years from the date of death; the Committee

execute the trust faithfully and to take care and promote the interest of all parties, then, upon petition of a creditor of the estate, or of any of the heirs, or of any person on behalf of any minor heir, the court shall cite such person to appear before it,"

¹⁰⁸ RCW 11.68.010.

¹⁰⁹ An estate administered under a non-intervention will must be formally closed, either by means of a final report, hearing and decree of distribution, or by means of a declaration of completion. RCW 11.68.010 in part provides: "If no application for a final decree is filed, the executor *shall*, when the administration of the estate has been completed, file a written declaration to that effect, and thereupon his powers shall cease." (Emphasis added.) See, in this respect, the proposed amendment to RCW 11.28.240 which will allow interested parties to request special notice of the filing of a declaration of completion.

¹¹⁰ Although this section refers to "claims against the deceased," claims against the estate (for example, funeral claims) must be filed within the time here prescribed, by virtue of RCW 11.40.080's command that "No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented as herein provided." See: *Hennessey Funeral Home, Inc. v. Dean*, 65 Wn. 2d 1000, 395 P.2d 493 (1964); *Butterworth v. Bredemeyer*, 89 Wash. 677, 155 Pac. 152 (1916). The Probate Committee has recommended that RCW 11.40.080 be amended by the substitution of the words "a decedent," for the words "an estate;" a change which will abrogate the existing requirement that claims against the estate be filed as are claims against the deceased. It is suggested that if the existing provisions are retained, there is much merit to the argument that the customary "notice to persons having claims against the deceased" is violative of procedural due process where used to bar claims "against the estate."

¹¹¹ No provision is made for extending this period.

proposes the extension of this section to "the estate" as opposed to only "real estate."¹¹² This amendment is suggested to encourage creditors to exercise their right to letters of administration¹¹³ where these have not been otherwise requested, and to provide a supplementary statute of limitations applicable to creditors' claims, since death tolls the otherwise applicable statute of limitations.

In 1963, at the instance of the Washington State Bar Association, the so-called "probate homestead" was increased from \$6,000 to \$10,000.¹¹⁴ The Probate Committee suggests the retention of this increase, and, in addition, proposes the elimination of the restriction that that amount include the house and household goods. The Committee further recommends the deletion of the existing prohibition against claiming awards in lieu of homestead from separate property of the deceased which is otherwise disposed of by will.¹¹⁵ The result of that provision was to penalize the making of a will since, if the deceased spouse had died intestate, the survivor could have claimed such property. The changes suggested by the Committee thus serve to permit an election as to the kind and nature of the property to be awarded and set aside free of the burdens of administration.

RCW 11.52.022 deals with the "award in addition to homestead" and considers the amount of property passing outside the will or the jurisdiction of the court as a condition to such award. Previously, this award became discretionary if the surviving spouse was entitled to receive insurance on the life of the deceased in excess of five thousand dollars. The Probate Committee's proposal will increase the amount to ten thousand dollars. The new section also alters the language employed to take into consideration other property, as well as insurance, such as joint checking accounts, savings bonds, and property held in joint tenancy. The increase in this amount increases the amount of property which may be taken by the survivor extrajudicially, either as a homestead or as an award in addition to homestead.

Needed reform has been supplied by a suggested provision¹¹⁶ which will overrule the holdings of the Washington court that, even though

¹¹² RCW 11.04.270, as amended by the Committee, also states that "this section shall not affect liens upon specific property, existing at the date of the death of the decedent."

¹¹³ By virtue of RCW 11.28.120 creditors are the last category of interested parties who are allowed letters of administration.

¹¹⁴ RCW 11.52.010 and 11.52.020.

¹¹⁵ RCW 11.52.016.

¹¹⁶ New Section 11.52.050.

all of the property of the estate is set off under chapter 11.52 (as a "probate homestead"), the estate must still be closed according to the procedures specified in chapter 11.76. The recommended section provides that,

If the net estate is set off under the provisions of RCW 11.52.010 through 11.52.030 to the surviving spouse or for incompetent heirs, the court shall, at the time of making such award and without any additional notice, close said estate and discharge the personal representative.¹¹⁷

This improved procedure will permit the settlement of the small or modest estate, where there is no will, with a minimum of time and expense.

Also of consequence in promoting the prompt disposition of estates is the recommended elimination of the current requirement¹¹⁸ that a report be entered within thirty days of the expiration of the time for filing creditor's claims. Instead, the Probate Committee recommends that an "annual" report be required.¹¹⁹ With respect to a small estate, a final report is usually filed as the annual report, and little change is worked here. However, as to large or complicated estates, the annual report is designed to serve as a source of information to heirs and beneficiaries, and as a means of impetus to a speedy conclusion of the administration.

GUARDIANSHIP

Few areas of law have been as neglected as the law of guardianship. Since it was apparently considered an unimportant appendage to codes respecting the administration of decedent's estates, "like topsy, the law of guardianship just grew, and it grew in a very illogical fashion."¹²⁰ To rectify the Washington situation, the Probate Committee has proposed a number of changes. Initially, the Committee has defined with precision the persons who are subject to guardianship. Minors, the insane, and mentally incompetent persons are now defined as "incompetents." This terminology was taken from the Model Pro-

¹¹⁷ Although this section authorizes closure without additional notice, notices would have already been given to the heirs by virtue of RCW 11.52.014 and its reference to RCW 11.76.040, and to creditors if they so specially requested it under RCW 11.28.240.

¹¹⁸ RCW 11.76.010.

¹¹⁹ RCW 11.76.010 has been altered to read: "Not less frequently than annually from the date of qualification, unless a final report has theretofore been rendered, the personal representative shall make, verify by his oath, and file with the clerk of the court a report of the affairs of the estate."

¹²⁰ MODEL PROBATE CODE § 183 (Simes 1946).

bate Code, and includes persons under the age of twenty-one years,¹²¹ persons who are incapable by reason of insanity, mental illness, imbecillity, idiocy, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity of either managing his property or caring for himself, or both. This definition is not designed to enlarge the class of persons formerly included within the terms "insane and mentally incompetent persons." Rather, it recognizes that the term "insanity" has no definite meaning except in connection with a particular purpose for which the mental state is to be determined, and provides a choice for those whose sensitivities would prevent them from declaring that a relative was "insane." Like the existing provision,¹²² this definition does not provide guardianship for physically incompetent persons.¹²³ Although this possibility was considered by the Committee, it was rejected with the realization that no matter how great the physical incapacity, such a person may still manage his property and care for himself by a servant or agent if his mind is unimpaired. This being true, a guardian is not required. Of course, where physical disabilities impair one's mental capacity, the prerequisites of incompetency may be met.

One area of guardianship law, fraught with particular difficulty, concerns those persons who require help in managing their affairs, but who are not legally incompetent, *i.e.*, the so-called *competent incompetents*. Although no recommendation is made in the current Probate Committee proposal, this matter deserves extensive study. Most attorneys have probably experienced the problems involved in assisting those persons who are in the twilight zone between competency and incompetency. Such a person may be one who has both lengthy lucid and unconscious periods, or who is oriented as to time and place and is aware of the nature, size and location of his property, but who is, by reason of age or health, careless or forgetful in depositing funds, paying bills, or otherwise administering his affairs. Other than guardianship, none of the available solutions is very effective.¹²⁴ In Washing-

¹²¹ A minor is now defined in RCW 11.92.010.

¹²² In *In re Nelson*, 12 Wn.2d 382, 121 P.2d 968 (1942) the court emphasized that one should not be declared mentally incompetent merely because he suffers from some physical malady.

¹²³ At least one court has held a statute providing for the guardianship of a person whose incompetency was purely physical to be unconstitutional in that it amounted to a deprivation of the right of enjoying and defending life and liberty and of acquiring and possessing property. *Shafer v. Haller*, 108 Ohio St. 322, 140 N.E. 517 (1923).

¹²⁴ Massachusetts partially solves this problem by allowing a conservator to be appointed for a person who "by reason of advanced age or mental weakness is unable to properly care for his property." MASS. ANN. LAWS ch. 201, § 16 (1955).

ton, the device most often employed is the "power of attorney." Yet, this is clearly vulnerable since the agent's authority to act depends on the principal's ability to validly delegate such authority in the first instance, and to keep it in force. Likewise, use of an inter vivos trust also requires competency at the time of the trust's execution and at the time of delivery of the trust assets. This also has the disadvantage of possibly permanently divesting the trustor of control of his property when all that was necessary was temporary management.

Although the creation of joint tenancies in bank accounts may provide a solution with respect to paying medical bills and the like, again there is the problem of competency at the time of the tenancies creation. There is also the danger that the disabled person's property may ultimately pass to those who would not otherwise have been the object of his bounty.

Finally, while guardianship is an effective solution where the person to be helped is incompetent, guardianship is both cumbersome and expensive, particularly when the ward dies shortly after the creation of the guardianship.

As an alternative to these devices, it has been suggested¹²⁵ that a statute be enacted under which a document having the formalities of a will could be executed, which would authorize a named doctor or attorney to certify that one was incompetent in the sense of being unable, either temporarily or permanently, of taking care of his business affairs. The document would recite that upon such certification, a designated person would have full authority to manage *the competent incompetent's* business affairs. The document could also contain instructions similar to instructions to an executor included in a will.

Under such a proposal, some delay and expense would be involved since a court proceeding would be required. It is difficult to conceive of a method for establishing the fact that the instrument has become operative without some form of adjudication. For example, a bank could hardly be expected to transfer an account balance from the name of the ward to that of the person designated in the instrument merely on the strength of a physician's letter describing the ward's condition. Yet, even though adjudication be needed, this proposal offers two substantial advantages over our existing guardianship procedure. First, this would enable the ward to select his guardian or conservator;

¹²⁵ Wynn, *A Vacuum in Our Law—Management of Property of Quasi-Incompetent Persons*, in A.B.A., 1956 PROCEEDINGS, PROBATE AND TRUST LAW DIVISIONS 27, 31-32.

second, it would enable the ward to chart the course of action to be followed, *i.e.*, the ward could direct that certain assets be sold, others held, that a business be operated, and that funds be employed in a certain manner for particular purposes. For these reasons, it is suggested that the Bar give considerable attention to such a proposal. As previously noted, the Probate Committee did not consider this matter, but has made extensive suggestions with respect to the more essential, basic guardianship problems.

While the purpose of administration of a decedent's estate is to collect assets, pay debts and taxes, and distribute the estate, guardianship may involve continuous administration. Indeed, the principal considerations in an incompetent's estate are the protection and care of the incompetent and his estate, and the preservation of the rights of third parties. To facilitate this objective, the Probate Committee recommends the elimination of the existing "non-claim" provision,¹²⁶ and has proposed a section to the effect that a creditor of an incompetent simply continues to deal with the personal representative (guardian) as he would with the incompetent.¹²⁷ In addition, another new provision¹²⁸ authorizes a creditor to file a written claim with the court for determination at any time before it is barred by the statute of limitations. Upon proper proof, such creditor may procure a court order for the allowance of his claim and for its payment from the estate. The Probate Committee has also recommended an express addition to the code¹²⁹ whereby the guardian may apply to the court for an order authorizing the settlement or compromise of claims by or against the incompetent.

The guardianship section of RCW title 11 has otherwise been altered to conform with the procedure with which attorneys are already familiar in the case of Veterans Administration Guardianships. The guardian's duties have been specifically enumerated,¹³⁰ and include: (1) the filing of a verified inventory within three months from the date of his appointment, including a statement of all encumbrances, liens and other secured charges on any items; (2) the filing of a verified account of his administration *annually* within thirty days after

¹²⁶ RCW 11.92.030.

¹²⁷ New Section 11.92.035.

¹²⁸ New Section 11.92.035 (2) provides that "Any person having a claim against the estate of an incompetent, or against the guardian of his estate as such, may file a written claim with the court for determination at any time before it is barred by the statute of limitations, and, upon proof thereof, procure an order for its allowance and payment from the estate. Any action against the guardian of the estate as such shall be deemed a claim duly filed."

¹²⁹ RCW 11.92.060.

¹³⁰ RCW 11.92.040, as revised by the Committee.

the anniversary date of his appointment and also within thirty days after the termination of his appointment; (3) if a guardian of the person, the care and maintenance of the incompetent, plus his training and education where a minor; (4) if a guardian of the estate, the protection and preservation thereof; (5) with some qualification, the investment and reinvestment of the incompetent's property in accordance with the rules applicable to investment of trust estates by trustees as provided in RCW 30.24. Where all or any portion of the incompetent's estate consists of cash and/or securities, and where these have been placed in the possession of savings and loan associations or banks, trust companies, escrow corporations, or other corporations approved by the court, the court may dispense with the giving of a bond¹³¹ or may reduce the same by the amount of such deposits of cash or securities.¹³²

One of the most significant and interesting changes proposed is the creation of an efficient means of handling the estate of a deceased incompetent by the guardian without the necessity of terminating the guardianship and commencing independent probate proceedings. The new section suggested¹³³ attempts to simplify the procedure involved when an incompetent dies intestate, and is designed to lessen expenses, by providing that the guardian has the power under his letters of administration, and subject to the court's direction, to administer the deceased incompetent's estate without further letters. This is subject to a petition brought within forty days from the date of the incompetent's death, either by the surviving spouse¹³⁴ or those entitled to letters of administration under RCW 11.28.120.¹³⁵ Of course, the exercise of this authority rests in the guardian's discretion, and if he elects to conduct the administration he must petition the court for an order transferring the guardianship proceedings to probate proceedings. Upon the court's approval, a new file is to be opened, captioned

¹³¹ RCW 11.88.100 provides for the oath and bond of a guardian, and New Section 11.88.107 provides that "In all cases where a bank or trust company, authorized to act as guardian, is appointed as guardian, or acts as guardian under an appointment as such heretofore made, no bond shall be required."

¹³² New Section 11.88.105.

¹³³ New Section 11.88.150.

¹³⁴ RCW 11.28.040.

¹³⁵ By virtue of this section, the persons entitled to letters of administration are: (1) The surviving husband or wife, or such person as he or she may request to have appointed. (2) The next of kin in the following order: (a) child or children; (b) father or mother; (c) brothers or sisters; (d) grandchildren; (e) nephews or nieces. (3) One or more of the principal creditors. In lieu of these, under certain conditions, the court may appoint any suitable person to administer the estate.

in the deceased incompetent's name, and containing a copy of the order of transfer. The guardian may then continue the administration of the estate without the necessity for any further petition or hearing. Provision is also made for notice to creditors,¹³⁶ and a four month non-claim period¹³⁷ is imposed.¹³⁸

The foregoing procedure is effectuated only where the incompetent dies intestate, where those entitled to letters of administration do not request them, and where the guardian elects to conduct the administration. The Probate Committee has recommended a new section¹³⁹ which sets forth comprehensive provision for the termination of a guardianship with, or without, a court order; and a new section¹⁴⁰ which relates to the settlement of the estate upon termination of the guardianship other than by the death of the incompetent intestate. Within ninety days of the termination of the guardianship other than by death intestate, the guardian is to petition the court for an order settling his account, and the court is to set a date for hearing such petition (after due notice.)¹⁴¹ If the court is then satisfied that the guardian's trust has been properly discharged, an order will be entered approving the account.¹⁴²

In addition to the alterations previously noted, the Committee has recommended that the guardian be given the authority to exchange, or grant an easement, license or similar interest in any of the incompetent's property, in addition to the power of sale, lease or mortgage,¹⁴³

¹³⁶ New Section 11.88.150 provides, in part, that "Notice to creditors and other persons interested in the estate shall be published and may be combined with the notice of the guardian's final account. This notice shall be published in a legal newspaper of the county of administration once each week for three successive weeks, with proof by affidavit of the publication of such notice to be filed with the court."

¹³⁷ This conforms to the proposed alteration of RCW 11.40.010.

¹³⁸ New Section 11.88.150 also provides that "Liability on the guardian's bond shall continue until exonerated on settlement of his account, and may apply to the complete administration of the estate of the deceased incompetent with the consent of the surety. If letters of administration or letters testamentary are granted upon petition filed within forty days after the death of the incompetent, the personal representative shall supersede the guardian in the administration of the estate and the estate shall be administered as a decedent's estate as provided in this title...."

¹³⁹ New Section 11.88.140.

¹⁴⁰ New Section 11.92.053.

¹⁴¹ Notice for such hearing is governed by RCW 11.88.040, as altered by the Committee, and may be given by registered or certified mail requesting a return receipt signed by the addressee only, or by personal service in the manner provided for service of summonses. The hearing must be held within ten days after service.

¹⁴² The order approving the final account is, by New Section 11.92.053, to be binding upon the incompetent, subject only to the right of appeal as upon a final order; provided that within one year after the incompetent attains his majority, any such account may be challenged by the incompetent on the ground of fraud.

The enactment of this section will, in part, qualify existing RCW 4.16.070.

¹⁴³ RCW 11.92.090.

has provided for broker's fees and closing expenses in any such transaction,¹⁴⁴ and has authorized the guardian to perform *any* written contracts which the incompetent was bound to perform.¹⁴⁵

CONCLUSION

It has been said that in this life there are but three things which every man must do—be born, pay taxes, and die. It is the law and practice of probate which provides a structural framework for the consideration of the legal consequences of each event. Because probate touches every individual, this is the face of the Bar turned constantly to the public. Thus it is fitting that the monumental and expensive task of probate review and revision be undertaken by the State Bar Association. What has been presented is a comprehensive Probate Code eliminating that which is archaic, unrealistic, outmoded, or unnecessarily expensive, and which reflects current business practice and the realities of estate administration. True, no single legislative presentation can encompass and dispose of every consideration; undoubtedly there is much to be done. But to the extent that this proposal is deficient, a modern, considered base is presented onto which additional reform may be comfortably grafted. Where controversial provisions do appear, as in the intestate succession area, these may be avoided by drafting. Where the Committee has selected one policy, the individual may effectuate an alternative if he so chooses.

The proposed code represents a sizeable investment of money and talent in an attempt to update this vital area of law. Although the view of these authors may reflect their involvement with the Probate Committee, it is suggested that the bill be adopted. This recommendation is made in light of the fact that the code's effective date is 1966, and that being so monumental an undertaking, only its adoption will engender the inspection and consideration which is warranted. If the seasoning period comes pending its effective date, the impetus for careful dissection is supplied. If, on the other hand, it rests for a biennium, the mere passage of time will give an air of study which may not in fact have occurred.

¹⁴⁴ New Section 11.92.125.

¹⁴⁵ RCW 11.92.130, as altered by the Committee.